COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-676

MICHAEL J. GILBERG & others[1]

vs.

VINCENT MASTROMATTEO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On June 2, 2015, after their residential real estate management business turned sour, plaintiffs Michael J. Gilberg (Gilberg Jr.) and Erik Sundsted filed a complaint seeking a declaratory judgment that a partnership existed between them and defendant Vincent Mastromatteo, an order dissolving the partnership, and an accounting.[2] On February 11, 2016, Michael A. Gilberg (Gilberg Sr.) was added as a plaintiff by agreement of the parties. The plaintiffs later filed a complaint for contempt against Mastromatteo alleging that he violated a stipulation and order that had been entered shortly after litigation commenced. A Superior Court judge held a bench trial on both the partnership and contempt cases. The judge found an

[1] Michael A. Gilberg and Erik Sundsted.

[2] Mastromatteo filed counterclaims that are not at issue in this appeal.

equal partnership between Gilberg Sr., Sundsted, and Mastromatteo and ordered it dissolved. The judge also found Mastromatteo in civil contempt and ordered him to pay the plaintiffs damages and attorney's fees. Mastromatteo appeals from both judgments.

1. The existence of a partnership. Mastromatteo first argues that there was insufficient evidence that a partnership existed. The existence of a partnership is governed by rules set forth in G. L. c. 108A, § 7. Those rules provide that, subject to exceptions not relevant here, "[t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business." G. L. c. 108A, § 7 (4). They also provide that the sharing of gross returns does not in and of itself establish a partnership, that mere common ownership of property does not in itself establish a partnership whether or not the coowners share any profit from the use of the property, and that, subject to certain exceptions, persons not partners as to each other are not partners as to third persons. G. L. c. 108A, § 7 (1)-(3). Courts also consider other factors in determining the existence of a partnership, including "(1) an agreement by the parties manifesting their intention to associate in a partnership, (2) a sharing by the parties of profits and losses, and (3) participation by the parties in the control or management of the

enterprise." Fenton v. Bryan, 33 Mass. App. Ct. 688, 691 (1992).

Here, Gilberg Sr., Sundsted, and Mastromatteo were engaged in a business of buying residential real property and renting it out under the Federal Section 8 program. In general, Gilberg Sr. was responsible for maintenance, Sundsted for Section 8 compliance and bookkeeping, and Mastromatteo for securing financing. All were involved in rent collection. Three properties were purchased over the course of several years, primarily using funds obtained through loans secured by mortgages in Mastromatteo's name; one had been sold by the time the action was filed. For the most part, Mastromatteo held title to the properties, but two of the three were briefly owned by LLCs established by the three parties, which acquired the properties from Mastromatteo, and later transferred them back to him, for nominal consideration. (One property was transferred back to Mastromatteo so that he could sell it and use the proceeds to buy another property; the other was apparently transferred back to Mastromatteo because the LLC's ownership violated the terms of one of the mortgages.) This was consistent with an "Ownership Agreement" the three parties executed on January 21, 2010, shortly after the purchase of the first property, which stated that each of the three parties had contributed $15,850.66 to the purchase, that an LLC "will be

established to allow for equal ownership of the property," and that future costs associated with the property would be borne equally by the parties. Rent was deposited into bank accounts owned by the LLCs and to which Gilberg Sr., Sundsted, and Mastromatteo all had access, and from which they periodically took equal draws. Payments for mortgage, taxes, insurance, and utilities were made from the rental money.

The judge was warranted in concluding that a partnership existed among Gilberg Sr., Sundsted, and Mastromatteo. That they took equal draws from the LLCs' bank accounts is evidence that they each received a share of the profits, which, according to the statute, is prima facie evidence of a partnership, and which also satisfies the second Fenton factor. The Ownership Agreement manifests an intent to associate as a partnership, and indeed to third parties Mastromatteo referred to the others as "[m]y partners." See id. at 691 (noting that "there was evidence that the defendant acknowledged the plaintiff as his partner"). It is clear from the evidence discussed above that the three participated in the management of the enterprise. And, finally, Mastromatteo's transferring of the properties to the LLCs for nominal consideration suggests that these were partnership assets. This is confirmed by the fact that payments relating to the properties, including mortgage payments, were

made from rental funds that had been deposited into bank accounts owned by their LLCs.

2. Value of the parties' contributions. The judge concluded that Gilberg Sr., Sundsted, and Mastromatteo had each contributed equally to the partnership, and hence were entitled to an equal distribution of partnership assets (including the two pieces of real property owned by the partnership at the time the action was filed) after payment of all partnership liabilities (including the mortgages taken out by Mastromatteo to finance the various purchases, liability for which the judge found to be equal among the three). The judge reached this conclusion by relying on the opinion of the plaintiffs' expert, Stephen J. Hoar, who opined that the three had made equal capital contributions, and rejecting the opinion of Mastromatteo's expert, James DiBiasi, who opined that Mastromatteo had contributed approximately ninety percent of the capital. The judge also denied Mastromatteo's motion to strike Hoar's expert report. Mastromatteo argues on appeal that the judge's denial of the motion to strike constituted an abuse of discretion and that the judge erred by crediting Hoar over DiBiasi.

We first address the admissibility of Hoar's opinion. The proponent of expert evidence must establish the following five factors: "(1) that the expert testimony will assist the trier

of fact . . . ; (2) that the witness is qualified as an expert in the relevant area of inquiry . . . ; (3) that the expert's opinion is based on facts or data of a type reasonably relied on by experts to form opinions in the relevant field . . . ; (4) that the process or theory underlying the opinion is reliable . . . ; and (5) that the process or theory is applied to the particular facts of the case in a reliable manner." Commonwealth v. Barbosa, 457 Mass. 773, 783 (2010). We review for abuse of discretion. See Commonwealth v. Franceschi, 94 Mass. App. Ct. 602, 607 (2018).

Hoar's report states that he reached his conclusion by reviewing schedules of capital contributions he obtained from Sundsted, the partnership's bookkeeper, which show capital contributions by Sundsted of $68,115, Gilberg Sr. of $65,258, and Mastromatteo of $65,095. The schedules contain line items for various contributions that, for Sundsted and Mastromatteo, consist primarily of down payments and renovation costs. The schedules reflect that a substantial portion of Gilberg Sr.'s capital contributions derive from overhead, management, and profit not charged by Gilberg Sr.'s construction business for renovations to the properties. Hoar's report states that he did not audit or verify the information contained in the schedules, and at trial he clarified that he did not examine the invoices for work performed by Gilberg Sr.'s company. However,

Sundsted's schedules were not his only basis for concluding that the capital contributions were equal. The report also states that each of the partners in 2012 filed with the Internal Revenue Service (IRS) a Schedule K-1 stating that the partner had contributed $60,000 of capital to one of their LLCs, Gilman Terrace LLC. However, Gilman Terrace LLC's corresponding Form 1065 did not show a cash balance on Schedule L, line 1. According to Hoar, "the only reasonable explanation to be reached is, since no formal accounting records were kept at the time, the $180,000 ($60,000 each) was recorded as contributions to capital." In other words, the $60,000 noted on the 2012 Schedule K-1s "memoralize[d] the approximately $65,000 of capital contributions from each partner that related to the initial purchase and renovations to the properties from the date of purchase through the end of 2012."[3] Hoar's conclusion that the parties made equal capital contributions thus was based on Sundsted's schedules, the tax documents, and the consistency between them.

Mastromatteo argues that Hoar's failure to examine the documents underlying Sundsted's schedules means that the report would not assist the trier of fact, was not based on reliable data, and lacked a reliable method. We disagree. Although Hoar

[3] Hoar noted also that there had been no significant capital contributions since 2012, a fact Mastromatteo does not appear to dispute.

did not examine all of the underlying documents, he did examine the tax documents, which he described at trial as "[k]ind of like the Bible." When asked about the possibility that Gilberg Sr. fabricated his invoices, Hoar testified, "I can't lose sight of the fact, and I don't think anybody can, that tax returns were filed with the government under penalty of perjury, and that each reflect $60,000 per partner on the K-1s and on the partnership return. So I'm not . . . looking at it in a vacuum." There is no reason to doubt Hoar's conclusion that the tax documents were strong evidence of an equal partnership. Any question as to the failure of Hoar to review all of the underlying documents for Sundsted's schedules goes to the weight of Hoar's opinion, not its admissibility. The judge therefore did not abuse his discretion in admitting Hoar's opinion.

Mastromatteo also argues that the judge erred by crediting Hoar's opinion over DiBiasi's. The primary difference between the opinions is their treatment of Mastromatteo's mortgages.[4] DeBiasi considered all of the outstanding mortgage debt as capital contributions to the partnership, and therefore found that Mastromatteo contributed approximately ninety percent of the capital. Hoar's report did not consider the outstanding

[4] The reports also differ with respect to issues unrelated to the mortgage payments, but Mastromatteo does not argue that the judge erred by siding with Hoar on these issues.

mortgage debt because, according to him, a mortgage is "not a capital contribution."

Mastromatteo argues the entirety of the mortgage debt is attributable to him as a capital contribution as a matter of Federal tax law. He cites IRS Publication 541, which states, "Any increase in a partner's individual liabilities because of an assumption of partnership liabilities is considered a contribution of money to the partnership by the partner." This argument fails for two reasons. First, Federal tax law's treatment of a given type of financing is not necessarily conclusive of related State law issues. See Levine v. Amber Mfg. Corp., 6 Mass. App. Ct. 840, 841 (1978). Second, the argument is based on the false premise that Mastromatteo was solely liable for the mortgage debt. In fact, the judge found that the mortgage debt was a partnership liability. Thus, the mortgage debt is not an "increase in a partner's individual liabilities," and Publication 541 therefore provides no authority for the proposition that it constituted a capital contribution by Mastromatteo.

To be sure, because Mastromatteo alone was listed on the mortgages, he faced more risk than the other partners, which perhaps could be considered a capital contribution. But, even assuming this is true, neither party introduced any evidence on the value of this risk. Without such evidence, it was

reasonable for the judge to rely on Hoar's conclusion that the 2012 tax documents memorialized the parties' understanding that they had made equal capital contributions, and that this incorporated the value of Mastromatteo's risk.[5] See Adams v. Adams, 459 Mass. 361, 386 (2011) ("valuation of a partnership interest is an inexact science").

Mastromatteo argues that three cases support his position, but they do not. Yankee Microwave, Inc. v. Petricca Community Sys., Inc., 53 Mass. App. Ct. 497 (2002), held that shareholders' loans to grossly undercapitalized corporations should be treated as equity capital and should not be given priority over creditors. Id. at 522. That holding is irrelevant to the present case because here the mortgage debts were not loans to the partnership by its partners, and Mastromatteo's risk likely was incorporated into the equal contributions noted on the tax documents. Overnite Transp. Co. v. Commissioner of Revenue, 54 Mass. App. Ct. 180 (2002), and Davis v. Bicknell, 244 Mass. 352 (1923), are irrelevant for essentially the same reasons. We therefore conclude that the judge correctly found that Gilberg Sr., Sundsted, and Mastromatteo were equal partners.

[5] All the mortgages were executed in or before 2012, so the associated risk would have been incorporated.

3. Contempt. Two weeks after suit was filed, the court entered a stipulation and order that, as relevant here, required Mastromatteo to deposit all rent into the LLCs' bank accounts, provide the plaintiffs with an accounting and copies of all leases and rental agreements, not make withdrawals from the LLCs' bank accounts apart from certain specified business purposes (water, sewage, mortgage, tax, and insurance payments) without written authorization of the plaintiffs, and provide advance e-mail notification to Sundsted prior to making withdrawals. The judge found Mastromatteo in contempt for violating these provisions.

For a finding of contempt, there must be "a clear and unequivocal command and an equally clear and undoubted disobedience." Larson v. Larson, 28 Mass. App. Ct. 338, 340 (1990). Mastromatteo does not dispute that the court's command was clear and unequivocal, and we hold that it was. Moreover, there was sufficient evidence to support the judge's findings that Mastromatteo violated the order. Mastromatteo admitted at trial that he did not deposit all rents into the LLCs' bank accounts, agreed that he did not provide the plaintiffs with "updated information about the tenant rent collected for 2015 and [20]16," and also agreed that he made payments for things "other than water, sewer, mortgage, tax, and insurance payments," while testifying incorrectly that the order said he

did not need the plaintiffs' consent for those payments. This evidence is sufficient to support the judge's finding of contempt.

Mastromatteo next disputes the judge's calculation of damages. Sundsted's calculations, verified by Hoar, were that there was a total of $68,277 in missing rent and $76,886 in unexplained expenses, and that Mastromatteo had made a payment of $31,029 (which, if deducted from the missing rent would leave a balance of $37,248). Following trial, the parties submitted updated information on damages. In their motion for additional contempt damages, the plaintiffs stated that the unexplained expenses were now $76,987 and that the missing rent was now $41,099. Sundsted submitted an affidavit attached to that motion swearing that the missing rent had increased by $3,851 in the interim, which, when added to the amount that was already missing, totals $41,099. (Mastromatteo produced different figures.) The judge found that there were $39,000 in unaccounted-for rents and $76,987 in unauthorized expenditures, which the judge ordered Mastromatteo to pay to the plaintiffs. Although the judge did not lay his calculations bare, the evidence supported a larger damages award. The judge's findings therefore were adequately supported by the evidence.

Mastromatteo finally argues that the judge erred by awarding the plaintiffs $25,865 in attorney's fees, the amount

they requested. Mastromatteo argues first that some of these fees were not spent in prosecuting the contempt action, and therefore cannot be awarded. We disagree with the factual premise of this argument. Many of the line items in the billing worksheet attached to the fees affidavit specifically reference the contempt proceeding, parts of the billing worksheet were redacted and not included in the calculation, and one generically described line item was reduced by one hour. All this suggests that the plaintiffs' attorneys diligently segregated their work on the contempt case from their work on the underlying matter. Mastromatteo provides no factual basis to dispute that the calculations were correct.

Next, Mastromatteo argues that the plaintiffs improperly requested fees relative to the deposition of Mastromatteo and some of the trial dates, both of which concerned both contempt and noncontempt issues. We have not been provided a transcript of that deposition so cannot review the factual accuracy of that part of Mastromatteo's argument, and, in any event, it is entirely possible that some of the redactions were for time spent on other aspects of time spent on noncontempt aspects of the deposition and trial. Mastromatteo also argues that it is unreasonable for two attorneys to charge for the same deposition, but has no cited no legal authority for this proposition.

Finally, Mastromatteo argues that it is unfair to award the plaintiffs fees for their attorneys' work in reviewing and responding to a submission made by Mastromatteo, on the judge's instructions, to produce supporting documentation with respect to rent and unaccounted-for expenses. The purpose of awarding attorney's fees in civil contempt cases is to "compensat[e] the plaintiff for legal expenses and costs incurred as a consequence of the defendant's violation of the court order." Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 571 (1997). Reviewing and responding to a submission made at the direction of the court falls into this category, and there is nothing unfair or unreasonable about awarding fees for this work.

Judgments entered September 7, 2017, and October 31, 2017, affirmed.

By the Court (Rubin, Henry & Wendlandt, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: August 9, 2019.

[6] The panelists are listed in order of seniority.